Petition

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81-5107

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

WILLIAM BOYD TUCKER,

Petitioner

vs.

WALTER D. ZANT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

ROBERT B. REMAR
6658 Church Street
P. O. Box 1319
Douglasville, Georgia 30133
404/949-1271
Counsel of Record for Petitioner

LOIS R. GOODMAN
133 Luckie Street, N.W.
Eighth Floor
Atlanta, Georgia 30303
404/656-6021

ERIC G. KOCHER
1276 Spring Street, S.E.
P. O. Drawer 1337
Gainesville, Georgia 30503
404/532-5432

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

I. Did the charge to the sentencing jury that they could "recommend" the death penalty and the form of the written verdict given to that jury, which also stated that the jury would be "recommending" the death penalty, deny the petitioner of a jury properly and fully informed as to the meaning and effect of their verdict in violation of the petitioner's constitutional rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, when under Georgia law their recommendation constitutes an imposition of the death penalty since the trial judge has no discretion to change the recommendation?

II. Is it constitutionally permissible to impose a sentence of death when the evidence fails to establish an aggravating circumstance separate and apart from the alleged act of murder?

III. Was the petitioner's death sentence inadequately and improperly reviewed by the Georgia Supreme Court when the cases with which petitioner's were compared were not remotely similar, when appellate counsel had no prior notice of the cases that would be used in comparison and had no access to the confidential summaries of the cases used in comparison, and when the Georgia Supreme Court relied upon erroneous and incomplete information in conducting the sentence review, thereby depriving the petitioner of the effective assistance of counsel and due process of law and resulting in the imposition of a cruel and unusual punishment?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The final Order of the Superior Court of Butts County, Georgia denying petitioner's Petition for Writ of Habeas Corpus is not reported. It is attached hereto as Appendix 1. The Supreme Court of Georgia's denial of petitioner's Application for a Certificate of Probable Cause to Appeal, dated April 22, 1981 (Appendix 2), is not yet reported. The opinion of the Supreme Court of Georgia affirming petitioner's conviction and sentence of death is reported at 244 Ga. 721, 261 S.E.2d 635 (1979) (Appendix 3).

JURISDICTION

Petitioner is seeking review of the final Order of the Superior Court of Butts County, Georgia entered on February 18, 1981, denying petitioner's Petition for a Writ of Habeas Corpus. Petitioner timely filed an Application for a Certificate of Probable Cause to Appeal with the Supreme Court of Georgia on March 20, 1981. That Application was denied by the Supreme Court of Georgia on April 22, 1981. 28 U.S.C. § 1257(3) confers on this Court jurisdiction to review the final Order of the Superior Court of Butts County by Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. CONST. amend. VI.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend. VIII.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

William Boyd Tucker was tried and convicted in March, 1978 in the Muscogee County, Georgia, Superior Court of the crimes of murder, kidnapping with bodily injury and robbery by intimidation. He was acquitted by directed verdict of aggravated sodomy and by jury verdict of armed robbery. His conviction and death sentence were affirmed by the Georgia Supreme Court on November 21, 1979. Tucker v. State, 244 Ga. 721, 261 S.E.2d 635 (1979).

The alleged murder took place on August 21, 1977. Tucker was arrested the same day. At the time of his arrest, Tucker was twenty-one years old. His father had died suddenly six weeks earlier and Tucker was suffering extreme depression and despair as a result. He had been drinking and using drugs heavily since his father's death. On the day of his arrest,

he was intoxicated on alcohol, marijuana and barbiturates. Other than a driving under the influence charge that occurred shortly after his father's death, Tucker had no history of criminal activity and had never been convicted of a crime. Notwithstanding Tucker's impaired mental state, his lack of a previous criminal history, the complete lack of motive, and his heavy drug and alcohol use following his father's death, his court appointed attorney failed to have Tucker examined by a psychiatrist.

The trial was held March 6-9, 1978 in Columbus, Georgia during the midst of the worst epidemic of murders in Columbus' history. The community was in extraordinary fear regarding the series of seven murders known as the "stocking stangulations" that were occurring at the time. The jury was further prejudiced by the fact that Tucker was charged with aggravated sodomy and by the prosecutor's inflammatory references in closing to that charge even though a directed verdict had been granted. Furthermore, one of the jurors knew that the victim was allegedly pregnant even though this fact was irrelevant and was properly never adduced at trial.

The evidence at trial failed to establish that bodily injury occurred separate and apart from the alleged act of murder. Since there were no eyewitnesses or other direct evidence, the State was required to rely upon the testimony of the county medical examiner to establish bodily injury separate and apart from the murder. The same medical examiner testified by way of affidavit in the state habeas court that the autopsy findings alone could not provide a sufficient basis for a conclusion that bodily injury was inflicted separate and apart from the act of murder. It was his professional opinion that all of the injuries, fatal and nonfatal, were inflicted contemporaneously.

The trial court's charge to the jury contained serious errors, omissions and misstatements. The most serious was the charge that the jury had to decide whether to "recommend the death penalty" or "decline to recommend the death penalty." (Trial Transcript p. 914-915). Furthermore, the written form of the verdict that went out with the jury again used the language "recommend the death penalty." Under Georgia Code § 27-2534.1, the jury was not recommending sentence but was actually imposing sentence. By instructing the jury that they were to either recommend a death sentence or a life sentence, the jurors were left with the belief that their decision was only a recommendation and not the final and absolute determination of what the sentence would actually be.

Following the affirmance of his convictions and death sentence, Tucker filed his petition for writ of habeas corpus with the Butts County Superior Court. Petitioner Tucker and his mother testified in support of the petition. Tucker also introduced the deposition of his trial counsel and the affidavits of the county medical examiner, a forensic psychiatrist, an expert in criminal defense law, and his appellate counsel. Various types of documentary evidence were also admitted. The State presented no evidence. On February 18, 1981, the petition was denied in its entirety. The Supreme Court of Georgia denied petitioner's application for a certificate of probable cause to appeal on April 22, 1981.

STAGE OF THE PROCEEDINGS AT WHICH THE FEDERAL QUESTIONS WERE RAISED

The questions concerning: (1) the constitutionality of the jury charge and verdict form, (2) the constitutionality of imposing the death penalty in the absence of an

aggravating circumstance separate and apart from the alleged act of murder, and (3) the constitutionality of the sentence review process, were first raised and fully argued before the Butts County Superior Court in the petition for writ of habeas corpus and again raised and fully argued before the Georgia Supreme Court in the application for a certificate of probable cause to appeal. The full text of the specific portions of the record relied upon is set forth in Appendix 4.

ARGUMENT

I. THE CHARGE TO THE SENTENCING JURY THAT THEY COULD "RECOMMEND" THE DEATH PENALTY AND THE FORM OF THE WRITTEN VERDICT GIVEN TO THAT JURY, WHICH ALSO STATED THAT THE JURY WOULD BE "RECOMMENDING" THE DEATH PENALTY, DENIED THE PETITIONER OF A JURY PROPERLY AND FULLY INFORMED AS TO THE MEANING AND EFFECT OF THEIR VERDICT IN VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE UNDER GEORGIA LAW THEIR RECOMMENDATION CONSTITUTED AN IMPOSITION OF THE DEATH PENALTY SINCE THE TRIAL JUDGE HAD NO DISCRETION TO CHANGE THE RECOMMENDATION.

At the conclusion of the evidentiary portion of the sentencing phase of the trial, the trial judge instructed the jury that if they found an aggravating circumstance, "then it is your duty to consider all of the matters that I have called to your attention, and in your discretion to say whether or not the jury will recommend the death penalty, or whether you will decline to recommend the death penalty." (Trial Transcript, p. 914, attached hereto as Appendix 5). The prepared form of the written verdict which appears on the back of the indictment and which went out with the jury during the sentencing stage of the trial for their use in putting their verdict into writing also used the word "recommend." (Appendix 5).

Contrary to the trial court's instruction, in Georgia the sentencing jury in a death penalty case has the sole, final and absolute authority to impose a death sentence. In Mason v. State, the Supreme Court of Georgia held that when a jury returns a recommendation of death, "the trial court does not have the discretion to reduce the sentence to life imprisonment." 236 Ga. 46, 50, 222 S.E.2d 339 (1976). By instructing the jury that they could recommend a death sentence, the jury was erroneously led to believe that the decision they came to was only a recommendation and not the sole, final and absolute determination of what the sentence would be. The jury was thus acting without the particular caution, restraint and deliberation that is essential when the final and ultimate decision of life or death is presented. The jury was not fully informed and aware that they, rather than the trial court or some other tribunal, had the responsibility for fixing and determining the sentence.

The suggestion to a sentencing jury that their decision is only a recommendation detracts from and lessens the sense of responsibility which they must have for the sentence imposed. The jury which imposed the death sentence on William Boyd Tucker was not aware of the "peculiar and sole responsibility" resting upon them. "Jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard to the consequences of their decision." McGautha v. California, 402 U.S. 183, 208 (1971). In this case the sentencing jury was unaware of the consequences of their decision. A charge which states that a jury's sentence is only a recommendation suggests that some other body or individual will be evaluating their recommendation and deciding whether or not follow it. Juries so charged are not properly or adequately guided or advised as to their singular

basic tenet of the constitutional guarantee of a trial by jury in which the jury acts as the sole decision maker with the responsibility for the sentence determination, a power at the heart of the right to a trial by a jury of one's peers. Unless the writ is granted and the death sentence vacated, juries in Georgia will continue to impose death sentences without the careful and adequate guidance mandated by Gregg.

II. PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BECAUSE THE EVIDENCE FAILED TO ESTABLISH AN AGGRAVATING CIRCUMSTANCE SEPARATE AND APART FROM THE ALLEGED ACT OF MURDER AND BECAUSE THE TRIAL COURT FAILED TO PROPERLY AND ADEQUATELY CHARGE THE JURY AS TO AGGRAVATING CIRCUMSTANCES.

Under Georgia law, in order for the death penalty to be imposed the jury must find, beyond a reasonable doubt, the existence of one of the statutory aggravating circumstances enumerated in Georgia Code § 27-2534.1. Petitioner Tucker's death sentence is based upon the finding by the jury that the murder was committed during the commission of another capital felony, kidnapping with bodily injury. Ga. Code § 27-2534.1(b)(2). Since kidnapping alone will not support a sentence of death, the jury had to find bodily injury in addition to the injuries that caused death. Patrick v. State, 247 Ga. 168, 170, 274 S.E.2d 570 (1981). As a result of this Court's decision in Godfrey v. Georgia, 446 U.S. 420, and the Georgia Supreme Court's subsequent decision in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), when the aggravating circumstance involves injury to the victim, the death sentence can only be imposed when it is proven that the injury occurred separate from the act causing death and prior to the death itself. Hance v. State at 861-862.

The evidence presented at trial showed that the victim suffered four stab wounds, one of which was fatal, and

small bruises and contusions on the knees. There was no evidence introduced to show when these injuries occurred. More importantly, the prosecution failed to prove that the injuries occurred prior to death. Without this crucial proof, only a conviction for kidnapping could be sustained, and kidnapping will not support a sentence of death.

The affidavit of Joe M. Webber, M.D., Medical Examiner of Muscogee County, Georgia, was introduced at the habeas hearing. Dr. Webber performed the autopsy on the victim and testified at trial. In his affidavit, he testified that no conclusions can be reached based upon the autopsy report as to when the bruises and contusion occurred. Furthermore, the knife wounds were inflicted simultaneously. Dr. Webber testified that it was his "professional opinion that the autopsy findings alone would not provide a sufficient basis for a conclusion that the injuries sustained by the victim were inflicted separate and apart from the terminal event." (Petitioner's Exhibit 3) The autopsy findings were the only evidence concerning the bodily injury presented at trial.[1/]

This case is clearly governed by the principle laid down in Godfrey v. Georgia, 446 U.S. 420 (1980). Applying the

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[1/] Dr. Webber was never asked directly at trial whether the injuries occurred prior to death. Of course, this was the prosecution's burden. He was asked by defense counsel:

> Q. Doctor, is it possible to tell with any degree of medical certainty which came first, the knife wounds or the contusions and abrasions?
>
> A. No, Sir.

(Trial Transcript, p. 531) Contrary to the habeas court's characterization of this testimony as inconsistent with the affidavit, it actually reinforces the substance of the affidavit testimony. Unfortunately, the trial testimony was just not properly developed. Further questioning would have revealed that it was not possible to tell whether the injuries occurred before or after death.

Godfrey reasoning, there must be proof beyond a reasonable doubt of acts separate and apart from the murder in order to sustain a death sentence. The Georgia Supreme Court applied the Godfrey rationale in the case of Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). The Hance holding regarding the aggravated battery component of Ga. Code § 27-2534.1(b)(7) is directly applicable to the bodily injury component of the aggravating circumstance of kidnapping with bodily injury. In Hance the court held that "[i]n order to constitute aggravated battery, the bodily harm to the victim must occur before death" and that the "death of a victim who dies instantaneously with little or no forewarning does not involve torture or aggravated battery." Id. at 861, 861-862. In this case there was no evidence that the bodily injury occurred before death. In fact, it was the opinion of the medical examiner that all injuries, fatal and non-fatal, occurred simultaneously.

Tucker's case is nearly identical to the case of Patrick v. State, 247 Ga. 168, 274 S.E.2d 570, (1981). This Court vacated the Georgia Supreme Court's judgment affirming the death sentence, 245 Ga. 417, 265 S.E.2d 553, and remanded the case for further consideration in light of Godfrey. Patrick v. Georgia, ___ U.S. ___, 101 S. Ct. 522 (1980). In Patrick, the victim sustained three blows to the head, any one of which would have been fatal. Because the evidence did not establish an injury before the fatal blow, an aggravated battery was not proved. On remand, the Georgia Supreme Court vacated the death sentence.

The circumstances of this case do not satisfy the criteria laid out by the Georgia Supreme Court itself in the Patrick and Hance cases. Moreover, the Georgia Supreme Court

has once again failed to follow the constitutional principles established by this Court in Godfrey. Of particular concern to this Court should be the Georgia court's abdication of responsibility by refusing to hear the appeal from the denial of habeas relief notwithstanding the developments in the case law since Tucker's direct appeal.

The fact that a life will be taken in a constitutionally defective manner is sufficient in and of itself to warrant granting the petition for writ of certiorari. In addition, this case presents a vehicle by which the Court can clearly delineate the standards governing proof of aggravating circumstances. Finally, this case is important because of the Georgia Supreme Court's abdication of responsibility and clear resistance to the principles and rulings laid down by this Court. A strong and forceful message to the Georgia courts will help to insure the proper administration of justice and guard against the random and arbitrary imposition of the death penalty in the future.

III. THE PETITIONER'S DEATH SENTENCE WAS INADEQUATELY AND IMPROPERLY REVIEWED BY THE GEORGIA SUPREME COURT BECAUSE THE CASES WITH WHICH PETITIONER'S WERE COMPARED WERE NOT REMOTELY SIMILAR, BECAUSE APPELLATE COUNSEL HAD NO PRIOR NOTICE OF THE CASES THAT WOULD BE USED IN COMPARISON AND HAD NO ACCESS TO THE CONFIDENTIAL SUMMARIES OF THE CASES USED IN COMPARISON, AND BECAUSE THE GEORGIA SUPREME COURT RELIED UPON ERRONEOUS AND INCOMPLETE INFORMATION IN CONDUCTING THE SENTENCE REVIEW, THEREBY DEPRIVING THE PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW AND RESULTING IN THE IMPOSITION OF A CRUEL AND UNUSUAL PUNISHMENT.

In upholding the constitutionality of the Georgia death penalty statute, this Court relied heavily upon the protections believed to be afforded by the sentence review conducted by the Georgia Supreme Court pursuant to Ga. Code § 27-2537. Gregg v. Georgia, 428 U.S. 153 (1967). The Gregg Court found that the statutory mechanism for appellate review

is designed to serve "as a check against the random or arbitrary imposition of the death penalty" and "to insure that the sentence of death in a particular case is not disproportionate." Id. at 207, 199. Contrary to this Court's expectations, the sentence review conducted in this case failed to pass constitutional muster for essentially three reasons. First, the cases with which petitioner's were compared are not even remotely similar. Second, appellate counsel had no prior notice as to which of the hundreds of capital cases petitioner's would be compared with nor did counsel have access to the confidential case summaries that were actually used by the Georgia Supreme Court in determining what cases to use in the sentence comparison. Third, the Georgia Supreme Court relied upon erroneous and incomplete information in conducting the sentence review, misinformation that counsel did not have an opportunity to correct. As a result, the death penalty has been imposed upon Petitioner Tucker in an arbitrary and capricious manner contrary to the dictates of Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia.

When conducting the sentence review in a death case, the Georgia Supreme Court is required to compare the death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in the case under review is not excessive or disproportionate. Ga. Code § 27-2537(b)(3). Included in the published opinion must be a reference to the similar cases with which the appellants were compared. Ga. Code § 27-2537(e).

The cases with which petitioner's were compared are inapposite. A review of those cases establishes that the

Georgia Supreme Court failed to adequately perform its sentence review obligations. Two involved double murders,[2] two involved young children who were sexually abused,[3] four involved armed robbery,[4] one involved hideous torture,[5] and one involved the murder of a police officer during flight from an armed robbery.[6] See Tucker v. State, at 733.

This grisly recitation clearly demonstrates the lack of any real similarity between the six comparison cases and Tucker's. There was no armed robbery in Tucker's case, no sexual abuse of the victim, no double murder, no children or police officers were involved. The evidence at trial tended to show that Tucker abducted a convenience store clerk, then drove directly to an isolated area where he inflicted multiple stab wounds upon her. Id. at 722-723. Although a heinous crime, petitioner's offense was the murder of a single individual undistinguishable from the thousands of homicides committed in the United States each year. Petitioner Tucker's sentence is clearly disproportionate considering the cases with which his was compared.

Furthermore, there is nothing contained in the Georgia Supreme Court's sentence review that would provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."

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[2] House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), Bowen v. State, 244 Ga. 495, 260 S.E.2d 855 (1979).

[3] House v. State, Id., Bowen v. State, Id.

[4] Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977), Hunter v. State, 231 Ga. 494, 202 S.E.2d 441 (1973).

[5] Stanley v. State.

[6] Collier v. State.

Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 1767 (1980). In fact, the premeditated double murder held in Godfrey to be indistinguishable from other murder cases, is certainly more "depraved" than the facts of this case.

The selection of clearly inapposite cases for comparison purposes is compounded by the fact that appellate counsel had no way of knowing in advance what cases the Georgia Supreme Court would use in conducting the sentence review. Moreover, that court has failed to establish any guidelines or standards by which counsel can determine which of the hundreds of cases are likely to be used. The sheer number of cases involved makes it impossible for appellate counsel to present cogent arguments or to articulate and distinguish the cases that will be used for comparison.[7/]

Furthermore, the Georgia Supreme Court, pursuant to Ga. Code § 27-2537, employs an assistant who compiles summaries and abstracts of the hundreds of cases used by the court in conducting the reviews. These abstracts are not available to a defendant or his counsel. There is, therefore, no way to know whether the abstracts and summaries are accurate and complete. Moreover, counsel must read the trial transcripts and records of proceedings in literally hundreds of cases in order to possess the same information that is used by the Georgia Supreme Court when judging his client's life. One result of this secrecy is that the court can use cases in its comparison that do not recite any facts in the published opinion. For example, the court compared petitioner's case with the case of Hunter v. State, 231 Ga. 494, 202 S.E.2d 441 (1973). Since no

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[7/] As of November 12, 1980, there were 603 cases used by the Georgia Supreme Court in conducting sentence reviews.

facts are set out in that opinion, appellate counsel, a court appointed public defender, would have had to travel from Columbus, Georgia to Atlanta, Georgia, a distance of over one hundred miles, and spend a day reading the transcript and record in order to know the facts of a case that his client's case had been compared with.[8/]

The sentence review in a death case, as well as the trial itself, must satisfy the requirements of the due process clause. Sentencing is a critical stage of the proceedings at which the defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 403 U.S. 349 (1977). This is particularly important because the sentence review conducted by the Georgia Supreme Court is an integral part of the death penalty sentencing scheme under Georgia law and was one of the components this Court relied upon in upholding the constitutionality of that scheme. See, Gregg v. Georgia. Yet in this case, counsel had no prior notice of the cases that would be used in comparison, there were no standards by which he could determine what cases might be considered comparable by the Georgia Supreme Court and he had no access to the case summaries upon which the comparison was actually made. The result of these procedural deficiencies is that the comparison cases have little similarity to the facts of petitioner's case.

The final infirmity in the sentence review was that erroneous and incomplete information was relied upon by the Georgia Supreme Court. Pursuant to Ga. Code § 27-2537 the trial court is required to submit a report in the form of a

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[8/] In Hunter, the death sentence had been reversed due to constitutional infirmities in the underlying death sentence statute as mandated by Furman v. Georgia. Using such a case in the sentence review process in itself violates the Eighth Amendment.

standard questionnaire to the supreme court. The court uses the report in reviewing the appropriateness of the death penalty. The trial court's report in this case contained serious omissions and inaccuracies.[9/] Moreover, neither trial counsel nor appellate counsel recalled having had the form submitted to them for comment. No comments were in fact made by counsel and the misinformation was considered by the Georgia Supreme Court to be uncontradicted.

In Gardner v. Florida, 430 U.S. 349 (1977), this Court held that a death sentence cannot stand where counsel

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[9/] These include:

1. Failure to note that the youth of the defendant was a mitigating factor. Tucker was twenty-one years old.

2. Failure to note that the murder was committed under the influence of mental or emotional disturbance. Tucker's father had died six weeks before the murder and Tucker was suffering extreme depression and despair.

3. Failure to note that at the time of the murder the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of intoxication. Tucker had been using drugs heavily since his father's death and was intoxicated on alcohol, marijuana and barbiturates the day of the murder.

4. Incorrectly stating that the defendant's physical or mental condition did not call for special consideration.

5. Incorrectly stating that there was no evidence that the jury was inflamed by passion, prejudice or other arbitrary factor. At least one of the jurors knew that the victim was allegedly pregnant. Trial Transcript at 294. Furthermore, the wave of sexually motivated killings that had been occurring in Columbus, Georgia at the time of trial made it extremely difficult for the defendant to receive a fair trial. This was compounded by the prosecution's inflammatory sexual reference in closing.

6. The trial court made no comments concerning the appropriateness of the death sentence.

for the defendant is not given an adequate opportunity to comment on facts that may be considered in the sentencing decision. The Gardner Court stated that "the truth seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." The Court went on to hold "that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Id. at 361, 363.

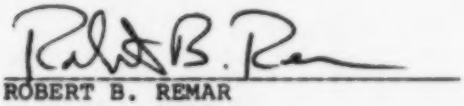
The lack of comments by defense counsel, whether by omission on their part or as a result of their failure to be afforded an opportunity to comment, resulted in Tucker being denied the effective assistance of counsel. The qualitative difference between death and lesser penalties demands a greater degree of reliability when the death sentence is imposed. Lockett v. Ohio, 438 U.S. 586 (1978). The sentence review conducted in Petitioner Tucker's case falls far below the minimum level of reliability that would permit the imposition of the ultimate punishment.

This case is important not only because a life is at stake, but because of the complete failure of the Georgia Supreme Court to conduct its sentence reviews in a manner consistent with the decisions and expectations of this Court. The Petition for Writ of Certiorari should be granted so that this Court can establish the constitutional guidelines for conducting sentence reviews thereby insuring that this critical stage in the process is not reduced to a mere rubber stamp formality.

CONCLUSION

Given the enormity of the interests and issues involved in this case, petitioner prays that a writ of certiorari issue to review the judgment below.

Respectfully submitted,



ROBERT B. REMAR
P. O. Box 1319
Douglasville, Georgia 30133

ERIC G. KOCHER
P. O. Drawer 1337
Gainesville, Georgia 30503

LOIS R. GOODMAN
133 Luckie Street, N.W.
Atlanta, Georgia 30303

APPENDIX 1

RECEIVED
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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM BOYD TUCKER,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	CASE NO. 4766
	:	
WALTER ZANT,	:	
SUPERINTENDENT,	:	
GEORGIA DIAGNOSTIC AND	:	
CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Muscogee County. Tucker was convicted of Robbery by Intimidation; Kidnapping with Bodily Injury, and Murder. He was sentenced to death for Murder and life imprisonment and a term in the penitentiary for the other offenses. His convictions and sentences were affirmed by the Supreme Court. Tucker v. State, 244 Ga. 721 (1979). Certiorari was denied by the Supreme Court of the United States.

The Petition contains 37 numbered paragraphs, 23 of which allege substantive claims for relief. (11-33). The Court will rule on those paragraphs containing

N. BK. NO. 13 PAGE 409-423

claims for relief by paragraphs corresponding numerically to the paragraphs in the Petition.

The record in this habeas case consists of the transcript of proceedings before this Court on October 16, 1980; the deposition of William S. Cain; the affidavits of Dr. Lloyd T. Baccus, Dr. Joe M. Webber, Austin E. Catts, and Richard O. Smith; and the transcript and record of Petitioner's trial in Muscogee Superior Court commencing on March 6, 1978.

11.

In Paragraph 11, Petitioner alleges his death sentence violates the Eighth and Fourteenth Amendments to the Constitution of the United States and that it is arbitrarily and capriciously applied in Muscogee County. The Georgia death penalty statute has been declared consitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). There is no evidence to support the argument that the death penalty is applied arbitrarily and capriciously in Muscogee County.

12.

Petitioner alleges in Paragraph 12 that the evidence was insufficient to establish beyond a reasonable doubt the statutory aggravating circumstance of kidnapping with bodily injury. The Supreme Court has already decided there was sufficient evidence on this point. See Tucker v. State, 244 Ga. 721, 732 (1979).

13.

In Paragraph 13, Petitioner contends his Eighth and Fourteenth Amendment rights were violated by imposition of the death sentence because his case is not distinguishable from many cases in which the death sentence was not imposed. The Sentence Review of Petitioner's case has been conducted. See Tucker v. State, at 733.

14.

In Paragraph 14, Petitioner alleges the imposition of the death penalty violates his Eighth and Fourteenth Amendment rights because the evidence did not establish beyond a reasonable doubt an aggravating circumstance separate from the alleged act of murder. This issue has already been decided. See Tucker v. State, at 732.

15.

In Paragraph 15, Petitioner contends the trial judge failed to charge properly the jury as to the aggravating circumstance of kidnapping with bodily injury. Kidnapping with bodily injury was defined during the charge to the jury in the guilt/innocence phase of the trial. (Trial Transcript, p. 832). The claim for relief in Paragraph 15 is without merit.

16.

In Paragraph 16, Petitioner alleges the imposition of the death penalty violates his

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constitutional rights because the trial judge failed to inform fully the jury as to the meaning and effect of their verdict. This allegation, however, is without merit because the jury was charged "...you would be authorized but not required to impose the death penalty." (Trial Transcript, p. 832).

17.

In Paragraph 17, Petitioner alleges imposition of the death penalty violates his constitutional rights because the charge to the jury compelled the imposition of the death sentence. This issue has already been decided adversely to Petitioner. The Supreme Court concluded that the charge made clear to the jury they could impose a life sentence even if they found the existence of an aggravating circumstance. Tucker v. State, at 728. (See Trial Transcript, p. 914).

18.

See Paragraph 17.

19.

Paragraph 19 complains that the trial court did not instruct the jury on the law regarding mitigating circumstances. However, the trial court did charge the jury on the law concerning mitigating circumstances. (Trial Transcript, p. 913). The law does not require that any particular mitigating circumstances be set out. Thomas v. State, 240 Ga. 393(4) (1977); Potts v. State, 241 Ga. 67 (1978); Spivey v. State, 241 Ga. 477 (1978).

20.

Paragraph 20 claims that failure of the trial court to instruct the jury when they requested clarification as to the Georgia law regarding a sentence of life imprisonment violated Petitioner's constitutional rights. The Supreme Court has already concluded the trial court did not err in refusing to answer the question. Tucker v. State, at 730. Accordingly, this claim for relief is without merit.

21.

In Paragraph 21, Petitioner contends his constitutional rights were denied him because the jury was devoid of persons with objections to capital punishment and thus did not consitute a representative cross-section of the community. This claim is without merit. See Porter v. State, 237 Ga. 580 (1), (1976); Douthit v. State, 239 Ga. 81, 87 (1977); Hawes v. State, 240 Ga. 327 (5) (1977).

22.

See Paragraph 21.

23.

Paragraph 23 claims constitutional deprivation because the jury did not reflect a representative cross-section of the community but was biased in favor of the prosecution. Petitioner has produced no evidence and made no argument in support of this proposition, and it is found to be without merit. See Douthit v. State, supra; Hawes v. State, supra.

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24.

In Paragraph 24, Petitioner contends his conviction and death sentence violate his constitutional rights because they were imposed by a jury to whom the oath was administered by the District Attorney.

Petitioner correctly points out that Ga. Code Ann. §59-709 requires that the oath be administered to jurors by either the Judge or Clerk of the Court. However, the requirement was only added to the foregoing Code section in 1978, effective July 1, 1978. Ga. Laws 1978, p. 910. Petitioner's trial commenced on March 6, 1978, approximately four months before the new requirement was to take effect. Thus, this claim for relief is without merit.

25.

The claim raised in Paragraph 25 regarding the trial court's refusal to allow Petitioner to testify as to the voluntariness of his confession has already been decided adversely to Petitioner. See Tucker v. State, at 727.

26.

In Paragraph 26 the claim regarding the trial court's refusal to allow the testimony of Beverly Kiel has already been decided adversely to Petitioner. See Tucker v. State, at 726-27.

27.

The issue raised in Paragraph 27 regarding the admission of Petitioner's confession has already been decided adversely to Petitioner. See Tucker v. State, at 727.

28.

In Paragraph 28, Petitioner alleges his conviction and death sentence are unconstitutional because of alleged prosecutorial misconduct to inflame the passions of the jury through references to an aggravated sodomy charge and the wave of murders in the Columbus area.

Petitioner was acquitted of the aggravated sodomy charge by a directed verdict after the State presented its evidence. Tucker v. State, at 721. In light of that acquittal, subsequent references by the prosecution to aggravated sodomy (Trial Transcript, pp. 804, 808), to Petitioner's "perverted sexual desires" (Trial Transcript, p. 879) and the remark, "We know about his perverted sexual habits", (T.T., p. 888), can be viewed as improper. However, these remarks alone do not constitute prosecutorial misconduct. Defense counsel should have objected to them at trial. In that counsel's failure to object is raised in support of Petitioner's claim of ineffective counsel, the allegation in Paragraph 28 will be decided as part of the ineffective counsel claim.

As to the references to the Columbus murders, the Supreme Court in reviewing the motion for change

of Venue considered this point and concluded the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. See Tucker v. State, at 732.

29.

In Paragraph 29, Petitioner claims he was denied his right to an impartial jury because of passion, prejudice, or arbitrary factors such as jurors with knowledge of the victim's alleged pregnancy not being struck for cause, fear in the community from the wave of killings, and pre-trial publicity.

Petitioner points to two jurors who had prior knowledge of the victim's alleged pregnancy and contends and that this knowledge harmed Petitioner because this information was not presented at the trial. An examination of the record reveals that one of the jurors, Georgia Gaines, was subsequently excused for family sickness. (See Tucker v. State, at 723). Petitioner has failed to demonstrate how he was harmed by a juror who was subsequently excused. As to the other juror, the Trial Transcript at p. 295 reads as follows:

> "Q Do you remember whether she [the victim] was married or single?
>
> A I believe she was married.
>
> Q Any particular reason why you might remember that?
>
> A Well, I think she was pregnant as I recall.

Q If it came out in evidence that she was pregnant, would that influence your judgment at all insofar as either the guilt or innocence of this man, or the sentence he should receive?

A I don't think so.

Q You have no religious beliefs concerning the death of a fetus that might get in your way of passing judgment as to sentence?

A No.

Q Do you know of any reason why, if you are selected to serve in this case, you could not give this person, this defendant sitting right here, this one right here, a fair and impartial trial?

A I think I could give him a fair trial."

The foregoing excerpt indicates that the one juror who knew the victim may have been pregnant stated that he thought it would not influence his judgment and that he could give Petitioner a fair trial. Petitioner has presented nothing to show that this juror was not as good a choice as was available otherwise and that he was not fair and impartial. (See Cain Deposition, p. 215).

As to Petitioner's other claims as to fear in the community and pre-trial publicity, these matters have already been decided adversely to Petitioner. See Tucker v. State, at 731-32.

30.

Petitioner complains in Paragraph 30 of constitutional deprivation due to the lack of

impartiality of the Supreme Court and, more specifically, Chief Justice Nichols, regarding the death penalty. The former Chief Justice had only one vote in Petitioner's case and there is no reason to assume that he had any particular influence on his colleagues, all of whom voted to affirm Petitioner's conviction and death sentence. Petitioner has failed to prove his contention on this point, and no ground for relief is shown.

31.

In Paragraph 31, Petitioner alleges violation of his constitutional rights because the appellate review process of death sentences denies him effective assistance of counsel and a full and fair hearing. Petitioner has presented no proof on this issue. The complaint in Paragraph 31 is found to be without merit.

32.

In Paragraph 32, Petitioner claims he was denied effective assistance of counsel at trial and on appeal in violation of his Sixth and Fourteenth Amendment rights.

The Court has examined the deposition of William S. Cain, trial defense counsel for Petitioner. Mr. Cain graduated from Emory University Law School and has been a member of the bar for 32 years. (Cain Deposition, p. 88). Since 1975, he had served as public defender and stated that 90% of his practice

was criminal law. He stated that he has tried 25 murder cases, 10 to 15 cases involving the death penalty of which 6 were tried under the current statute authorizing the death penalty. (Cain Deposition, p. 89). Richard O. Smith was authorized to serve as Mr. Cain's assistant at trial and represented Petitioner on appeal. (Cain Deposition, p. 90).

Counsel filed numerous Motions. (See Record, pp. 13-25). Because Counsel knew Petitioner's father and had other personal connections with Petitioner's family, Counsel stated that he took this case more seriously than most and devoted "hundreds" of hours to it. (Cain Deposition, p. 117). Counsel interviewed every single potential State's witness and had the District Attorney's entire file of statements, reports, etc. (Cain Deposition, p. 118). Counsel stated that he had many meetings in which all the family were present and discussed "everything in detail, calling upon them to produce witnesses, particularly in the penalty phase." (Cain Deposition, p. 118). Contrary to allegations that counsel failed to explore potential defenses (see Catts Affidavit, p. 5), counsel considered but rejected the idea of pleading not guilty by reason of insanity and discussed the point thoroughly with Petitioner and his family. (Cain Deposition, p. 123). Petitioner testified at the habeas hearing that he never specifically asked Counsel for a psychological examination. (H.T., 44). Petitioner also stated that he revealed very

little to Counsel about his drug problem. (H.T., 44). Counsel decided against an alcohol/drug defense because it could backfire with a Muscogee County jury. (Cain Deposition, p. 127).

At the trial, Counsel made an opening statement (T.T., 346-349); cross-examined the State's witnesses (T.T. 345; 366; 376; 378; 382; 387; 414; 446; 462; 470; 477; 491; 501; 518; 525; 532; 549; 614; 651; 675; 759; 763; 767); made Motions (T.T. 360; 486; 572; 688); gave argument during guilt/innocence phase of the trial (T.T. 809-818); gave argument during sentencing phase (T.T. 908-912) after a lengthy argument by his assistant counsel (T.T. 893-907); presented four witnesses during the sentencing hearing (T.T. 839; 849; 857; 863) in addition to presenting Petitioner in his own behalf (T.T. 870-875).

Petitioner claims that Counsel was ineffective in handling the issue of kidnapping with bodily injury upon which the subsequent death sentence was imposed. Petitioner contends that the evidence is insufficient to support the conviction of kidnapping with bodily injury and offers the opinion of Dr. Webber, Medical Examiner for Muscogee County, in support of this claim.

Dr. Webber's affidavit is in conflict with his testimony at trial. Counsel did ask Dr. Webber the following:

> "Q Doctor, is it possible to tell with any degree of medical certainty which came first, the knife wounds or the contusions and abrasions?
>
> A No, sir."

(Trial Transcript, p. 531).

Dr. Webber's opinion that the knife wounds were all likely to be contemporaneous is nothing more than a conclusion not based on any evidence. The quality of opinion in his affidavit is characterized by the last sentence[1] of the affidavit which looks more like argument by Petitioner's counsel than professional opinion.

There is ample evidence from which the jury could conclude that kidnapping with bodily injury was committed prior to and independent of the murder. Even were this not the case, some overlapping, factually or legally, between two crimes is not a bar to using one as the aggravating circumstance for the other. Pryor v. State, 238 Ga. 698 (1977).

Another claim raised by Petitioner is that Counsel was ineffective in failing to object to references by the prosecution to the charge of aggravated sodomy after Petitioner was acquitted on that count by directed verdict. While Counsel should have objected in view of the directed verdict on the sodomy charge, the Court cannot conclude this omission contributed to the death sentence in a significant way. The evidence before the jury concerning the kidnapping and the brutality accompanying it and resulting in murder was so overwhelming that references to the sodomy charge, while perhaps inappropriate, are not likely

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[1] "...other evidence, such as an eyewitness, would be needed before a jury could have a sufficient basis to find the infliction of bodily injury separate and apart from the act of murder."

to have made any substantial difference in the jury's decision.

Petitioner has also produced opinion evidence by affidavit concerning the ineffective assistance claim.[2] While many points have been specifically addressed by Trial Counsel (See Cain Depostion, pp. 201; 203; 180; 217; 112-113; 173), all points covered by the affidavit of this able lawyer constitute the kind of hindsight which has never provided the basis for ineffective assistance claims. McKenna v. Ellis, 280 F.2d. 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering effective assistance." McKenna v. Ellis, supra; Pitts v. Glass, supra. Disagreements about trial strategy and tactics do not require a finding of ineffectiveness. Reid v. State, 235 Ga. 378, 379; see Hawes v. State, 240 Ga. 327, 329-330 (1977).

Petitioner's Counsel easily meets this test. He was experienced in the trial of criminal cases and unusually experienced in death penalty cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case. While it may be true that Counsel put up a relatively scant defense, the finest lawyer in the country could not put up a defense that did not exist. Defense Counsel's deposition shows him to be an

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[2] See affidavits of Austin E. Catts.

intelligent and concerned defense lawyer. The effort he put forth for Petitioner was certainly reasonably effective within the meaning of the standard.

As to the claim of ineffective assistance of counsel on appeal, counsel Smith's failure to comment on the sentencing report does not in itself constitute ineffective assistance. The claim for relief in Paragraph 32 is found to be without merit.

WHEREFORE, all allegations in the Petition having been found without merit, the Petition, as amended, is denied.

This 18th day of February, 1981.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Application No. 1590

RECEIVED APR 24 1981

SUPREME COURT OF GEORGIA

ATLANTA, April 22, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WILLIAM BOYD TUCKER V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk

APPENDIX 2

35393. PERRYMAN v. THE STATE.

MARSHALL, Justice.

The appellant was convicted of murdering Dorothy Moore. He was sentenced to life imprisonment. This is his appeal.

The state's main witness was the victim's nine-year-old daughter, Chelsa Moore. Chelsa testified that, while she was in another room in the house, she had heard her mother and the appellant arguing. The appellant told her mother that if she set one foot on the steps, he would shoot her. They then called Chelsa to go downstairs to get them cigarettes. After she had gotten the cigarettes, she saw the appellant shoot her mother as she was about to set foot on to the top step.

The appellant then came down the stairs. He said that he did not mean to do it and that the victim would be all right. He kissed her on the forehead and went for an ambulance, although he did not return.

At trial, the appellant, in contradiction to the testimony of Chelsa Moore, testified that he shot the victim as he was trying to put his leg brace in a closet. He testified that he slipped and that the gun went off accidentally.

APPENDIX 3

1. We find that a reasonable jury was authorized in believing the testimony of Chelsa Moore, rather than the appellant's testimony, and in convicting the appellant of murder. See Jackson v. Virginia, — U. S. — (99 SC 2781, 61 LE2d 560) (1979). The jury was clearly authorized in finding that the appellant's shooting of the deceased caused her death. See *James v. State*, 67 Ga. App. 300 (3) (20 SE2d 87) (1942). The trial judge was authorized in ruling that Chelsa Moore was qualified as a witness. See Code § 38-1607; *Thurmond v. State*, 220 Ga. 277 (3) (138 SE2d 372) (1964). This disposes of the appellant's first, third, and fourth enumerations of error.

2. In the second enumeration of error, the appellant argues that the trial judge erred in overruling his motion for mistrial, brought on the ground that the district attorney was engaging in a line of questioning a witness in such a manner as to penalize the appellant's post-trial silence in violation of Doyle v. Ohio, 426 U. S. 610 (96 SC

2240, 49 LE2d 91) (1976).

Our review of the transcript reveals that the complained-of testimony was elicited as much by defense counsel as by the district attorney. Therefore, if there was any error in admitting this testimony, it was induced error, which cannot be complained of on appeal. See *Threlkeld v. State*, 128 Ga. 660 (58 SE 49) (1907) and cits.

Judgment affirmed. All the Justices concur, except Hill, J., who concurs in the judgment only.

SUBMITTED SEPTEMBER 14, 1979 — DECIDED OCTOBER 23, 1979 — REHEARING DENIED NOVEMBER 21, 1979.

Murder. Fulton Superior Court. Before Judge Alverson.

Vernon S. Pitts, Jr., John Thomas Chason, for appellant.

Lewis R. Slaton, District Attorney, Joseph J. Drolet, Assistant District Attorney, Arthur K. Bolton, Attorney General, Mary Beth Westmoreland, Staff Assistant Attorney General, for appellee.

34814. TUCKER v. THE STATE.

HALL, Justice.

William Boyd Tucker, Jr., was indicted for murder, armed robbery, kidnapping with bodily injury and aggravated sodomy in connection with the August 21, 1977 slaying of Kathleen Perry. At the close of the state presented its evidence, the trial court directed a verdict of not guilty of aggravated sodomy. The other counts of the indictment were submitted to the jury, which convicted appellant of murder, robbery by intimidation and kidnapping with bodily injury. In the sentencing phase of the trial, the jury imposed a death sentence as punishment for murder, finding as the single aggravating circumstance that the murder was committed while the defendant was engaged in the commission of another capital felony, to wit: kidnapping with bodily injury. The trial court subsequently imposed a sentence of life imprisonment for robbery by intimidation and 20 years for kidnapping with

bodily injury. Tucker appeals from his convictions and from the denial of his motion for new trial.

1. Guilt-Innocence Phase

1. The evidence introduced at trial authorized the jury to find that after drinking heavily during the day and evening of August 20, 1977, and smoking several joints of marijuana, Tucker went to a Majik Market around 11 p.m. where he drank two more beers and played pinball. After waiting at the store some 45 minutes, Tucker sneaked behind its operator and sole occupant, Kathleen Perry, and stuck his finger in her back. She began putting money from the cash register into a paper bag. Tucker and the victim then got into his red Volkswagen and drove to Pierce Chapel Road. There Tucker killed Kathleen Perry by stabbing her four times.

Reuben Culpepper, Robert McLong, and McLong's sister were driving on Pierce Chapel Road when they passed a red Volkswagen with its lights on, parked in the road. The three saw Tucker in the car and a woman's shoe in the road beside the car. Shortly after passing, McLong and Culpepper decided to return to investigate. The Volkswagen passed them as they returned to the place where it had been parked. At the parking spot, McLong found a vest with a "Majik Market" insignia and then discovered Kathleen Perry's body, face-down in a ditch about 10 feet from the road. The three left, called the police and then returned to Pierce Chapel Road to await the arrival of the police. Shortly after the police reached the scene of the crime, Culpepper saw Tucker returning in the same red Volkswagen. He identified both the car and driver to the police. Tucker was immediately taken into custody. Shortly thereafter, appellant made an incriminating statement, in which he admitted the robbery by intimidation and the kidnapping. In his statement to police, Tucker stated that he could not remember what happened after Perry got out of the car but did recall a knife with long brown handles and lots of blood. At trial, Tucker again confessed to robbery by intimidation and kidnapping but testified that he could not remember a knife or the murder.

In enumeration of error 17, appellant contends that

his convictions and death sentence are contrary to law, justice and equity. We will consider the death sentence in detail below; however, we find that the evidence in the record authorized a rational trier of fact to find appellant guilty beyond a reasonable doubt of murder, kidnapping with bodily injury and robbery by intimidation. Jackson v. Virginia, — U. S. — (99 SC 2781, 61 LE2d 560) (1979); *Stinson v. State*, 244 Ga. 219 (259 SE2d 471) (1979).

2. In enumerations of error 9 and 15, appellant contends that his jury was improperly selected because the record affirmatively shows that thirteen jurors, including Georgia Gaines, were chosen. The poll of the jury after the sentencing phase was by name, and Georgia Gaines' name was not called. Pursuant to Code Ann. § 6-805 (f), this court asked the trial court to certify from memory or after a hearing (1) whether Georgia Gaines was excused from the jury, (2) and if so, why, and (3) whether defense counsel objected. After a hearing, the trial judge determined that Gaines was excused because of her husband's severe illness and that defense counsel either moved for her dismissal or consented to it. There was no error in excusing the juror and proceeding until a panel of twelve and two alternates were selected. *Ozburn v. State*, 87 Ga. 173 (1) (13 SE 247) (1890); *Hanvey v. State*, 68 Ga. 612 (1) (1882).

The supplemental transcript affirmatively shows that Gaines was excused for family illness and not because of any scruples related to imposition of the death penalty. No claim of error under Witherspoon v. Illinois, 391 U. S. 510 (1968), and its progeny exists.

Appellant contends that *Owens v. State*, 233 Ga. 869 (2) (214 SE2d 173) (1975), prohibits this court from using a supplemental transcript, developed through post-trial examination of attorneys or excused veniremen, to determine if veniremen were improperly excused at trial. We do not agree with this expansive reading of the case. In *Owens*, the Witherspoon examination of jurors was not reported in the record and was not available. We refused to allow a wholesale re-examination of veniremen and attorneys to determine basic juror qualifications for a case in which the state asked for and received the death penalty, and jurors were excused because of their

opposition to the death penalty. See *Coker v. State*, 234 Ga. 555 (7) (216 SE2d 782) (1975), death sentence reversed on other grounds, 433 U. S. 584 (1977). In this case, however, the statutory method of completing the record was used only to supply the reason for excuse of one juror, completely unrelated to Witherspoon.

Enumerations of error 9 and 15 are without merit.

3. Appellant enumerates as error the failure of the court reporter to record bench conferences. The record does not reveal whether or not the trial court ever granted appellant's motion to compel recordation of all proceedings, including bench conferences. While we agree that recording all proceedings is the best practice, we cannot reverse this case for failure to do so here. Appellant was obligated both to ensure that his pretrial motion for complete recordation was ruled upon and that if granted, was properly followed. *Harris v. State*, 237 Ga. 718 (230 SE2d 1) (1976), death sentence vacated on other grounds and remanded, 243 Ga. 244 (253 SE2d 707) (1979).

Moreover, we ruled in *Davis v. State*, 242 Ga. 901 (252 SE2d 443) (1979), that failure to record bench conferences cannot constitute reversible error unless appellant demonstrates harm. The harm appellant attempted to show is that failure to record bench conferences meant that no reason for excusing Georgia Gaines appeared in the record and that such excuse could have been error. Since the supplemental transcript supplies the reason for her excuse (Division 2), it is clear that there was no error. Enumeration of error 1 is without merit.

4. In enumeration of error 8, appellant contends that the trial court erred in overruling the motion for mistrial. The district attorney called James May, who testified that he had been in the Majik Market the night of the murder where he had seen a man playing pinball. The district attorney then asked, "Can you identify this person today?" May replied, "I believe so." The district attorney then asked, "Do you see him here in the courtroom? Seated up here at the table?" Defense counsel immediately moved for a mistrial based upon the suggestive question on identification. The trial court overruled the motion and admonished the jury: "Ladies

and gentlemen of the jury, I have admonished the District Attorney not to suggest to any witness what his testimony should be. And in weighing the testimony of this witness insofar as it relates to identification of any person in this particular case, you would have to consider the suggestion as to where the particular person might have been seated, and determine after all of the evidence that this witness gives, and after a cross-examination of the witness, the credibility and weight you would give to the testimony."

Appellant argues that the trial court erred in overruling the motion for mistrial, but he has not illustrated any error. Appellant admitted in his statement to police and in his testimony at trial that he had been in the Majik Market playing pinball on the night of the slaying. This admission removes any issue from the case relating to the identity of the pinball player. The prosecutor's leading question could not, therefore, prejudice the defendant. See *Hall v. State*, 243 Ga. 207 (1) (253 SE2d 160) (1979). Moreover, the trial court's careful admonition to the jury to weigh the identification testimony in light of the prosecutor's leading question was sufficient to dissipate the harmful effect, if any, of the question.

Enumeration of error 8 is without merit.

5. Appellant argues that several errors occurred in connection with the admission into evidence of the inculpatory statement he made to police shortly after his arrest. We will consider these enumerations together.

At trial, Tucker moved to suppress his statement arguing that it was not voluntarily made and that he had not understood his constitutional rights, especially his right to have the advice of counsel, at the time he made the statement. After holding a hearing outside the presence of the jury, as required by Jackson v. Denno, 378 U. S. 368 (1964), the trial court ruled that the confession was voluntarily made and was admissible.

At the hearing, Detective Mathews testified that he first advised Tucker of his rights at the scene of the crime and that Tucker said he understood them. Detective Mathews stated that he again gave Miranda warnings to Tucker at police headquarters prior to questioning and that he made no threats or promises to Tucker. According

to Mathews, Tucker then confessed, but this statement was not transcribed. Tucker was then readvised of his rights; he signed the waiver of rights form and repeated his story, which was typed as he spoke. Tucker signed this statement. Mathews testified that although Tucker said that he had been drinking, he (Mathews) did not think Tucker was drunk and unable to understand his rights because Tucker's demeanor was that of a normal person and he spoke coherently. Mathews stated that between ten and twenty minutes after signing the statement, Tucker asked that Beverly Kiel, a Columbus attorney, be called for him.

Ronald Jones, the director of the police homicide squad, testified that he had been present during the questioning of Tucker, that Mathews had read Tucker his rights, that no promises or threats had been made to Tucker, and that Tucker was able to speak coherently and did not seem drunk. According to Jones' testimony, he explained to Tucker the preliminary hearing procedure after Tucker had signed his statement. Tucker then asked who his attorney would be, and Jones explained that the court would appoint counsel for Tucker if he could not afford a lawyer. Tucker then asked Jones to call Beverly Kiel. Jones did so, and Kiel then spoke with Tucker. Appellant argues that this testimony demonstrates, at the least, that he did not understand his rights until after he had made his statement.

Appellant testified that at police headquarters, he asked that the police call attorney Beverly Kiel for him but that the police refused to do so until appellant had made a statement. Appellant also called Beverly Kiel as a witness. She testified that she had talked with appellant by telephone early in the morning after the slaying and that he had related to her the circumstances surrounding his making a statement to police. Her testimony about her phone conversation with Tucker was excluded as hearsay and on the ground that any statements made by Tucker were self-serving. The exclusion of this evidence is enumerated as error.

Factual and credibility determinations made at a suppression hearing by the trial court are respected by appellate courts unless clearly erroneous. *Johnson v.*

State, 233 Ga. 58 (209 SE2d 629) (1974). Although the testimony was in conflict, there is evidence to support the trial court's determination. We also find no error in the trial court's exclusion of Kiel's testimony. When a witness is impeached by a charge of recent fabrication, prior consistent statements are admissible to rebut the charge. No such impeachment occurred in this case, and appellant's prior consistent statements are, therefore, inadmissible. See *McCord v. State*, 83 Ga. 521 (1) (10 SE 437) (1889); *Crawford v. State*, 139 Ga. App. 347 (228 SE2d 371) (1976).

Appellant also argues that the trial court erred in not permitting him to testify to the jury solely on the issue of the voluntariness of his confession. Appellant has no such right. *Williams v. State*, 231 Ga. 508 (2) (202 SE2d 433) (1973).

Enumerations of error 6, 7 and 10 are without merit.

6. Appellant argues that his conviction for kidnapping with bodily injury violates Georgia's statutory double jeopardy provision, Code Ann. § 26-506, because kidnapping with bodily injury is an included offense of felony murder. Appellant was, however, convicted of malice murder. The jury was not even charged on felony-murder. Kidnapping with bodily injury is not an included offense as a matter of law of malice murder. *Pryor v. State*, 238 Ga. 698, 701 (234 SE2d 918) (1977); *Potts v. State*, 241 Ga. 67 (11) (243 SE2d 510) (1978). In addition, the bodily injury is not included as a matter of fact in the malice-murder conviction since the victim received three knife wounds and other cuts and bruises in addition to the fatal wound. *Id.*

Enumeration of error 11 is without merit.

II. Sentence Review

As required by Ga. L. 1973, p. 159 et seq., Code Ann. § 27-2537 (c) (1-3), and to complete our consideration of appellant's enumerations of error, we have reviewed the death sentence in this case as we review each case in which a death sentence is imposed. We have considered the aggravating circumstance found by the jury and the evidence concerning the crime and the defendant.

7. Appellant enumerates as error the charge of the

court during the sentencing phase of the trial that required the jury to find the presence of an aggravating circumstance by a preponderance of the evidence.

In its charge on aggravating circumstances, the trial court initially stated the incorrect, preponderance-of-the-evidence test. The court then stated on three different occasions the correct test, that the jury was required to find the presence of an aggravating circumstance beyond a reasonable doubt. The trial court was then apprised of its earlier misstatement and stated to the jury: "[O]n one occasion I inadvertently said find existing the aggravating circumstance by a preponderance of the evidence, that is not the test. I later told you that it's by a reasonable doubt and that is the proper instruction, before you consider the death penalty you must find the existence of the aggravating circumstance beyond a reasonable doubt." We find that the trial court's correction of its error complies with *Salisbury v. State*, 221 Ga. 718 (146 SE2d 776) (1966).

As the jury retired to begin its deliberations, the trial court gave to the jury a verdict form which read: "The following Aggravating Circumstance is submitted by the State of Georgia and must be proved beyond a reasonable doubt before you are authorized to find a verdict recommending the death penalty."

We find that the trial court corrected any misunderstanding which the jury might have had, and that a reasonable trier of fact could not fail to understand that the law required the state to prove the existence of an aggravating circumstance beyond a reasonable doubt.

Enumeration of error 2 is without merit.

8. Appellant argues that the trial court erred by not charging the jury more fully on mitigating circumstances and by not telling the jury that it could recommend a life sentence even after finding an aggravating circumstance.

This court has thoroughly reviewed the instructions of the trial court during the sentencing phase of the trial, and we find that the charge made clear to the jury that it could be merciful and impose a life sentence, even if the jury found the existence of statutory aggravating circumstances. Therefore, the charge of the trial court is not subject to the defects dealt with in *Spivey v. State*, 241

Ga. 477 (246 SE2d 288) (1978); *Hawes v. State*, 240 Ga. 327 (240 SE2d 833) (1978); *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1978).

Nor did the trial court err, as appellant argues, in failing to single out specific mitigating circumstances in giving its instructions to the jury. *Collier v. State*, 244 Ga. 553 (1979); *Potts v. State*, supra; *Spivey v. State*, supra.

Appellant's assertion that sending written instructions to the jury regarding aggravating circumstances without likewise sending written instructions to the jury regarding mitigating circumstances prejudices the jury by emphasizing the aggravating circumstances is without merit. See *Collier v. State*, supra.

Enumeration of error 3 is without merit.

9. Appellant contends that kidnapping with bodily injury can not be the aggravating circumstance which authorizes imposition of the death penalty. The bodily injury was, in fact, the murder, according to appellant, and the murder can not be used twice — once as the offense and again as the aggravating circumstance. As we indicated previously (Division 6), medical testimony authorized the jury to find that the victim sustained a number of injuries in addition to the fatal wound. The injury producing death and the bodily injury are not identical, and the aggravating circumstance is supported by the record. *Pryor v. State*, 238 Ga. 698, supra.

Enumeration of error 12 is without merit.

10. Appellant argues that the trial court erred in not submitting to the jury in writing the *entire charge* given during the sentencing phase. The trial court instead gave to the jury a verdict form which indicated which statutory aggravating circumstance was charged by the state, that the circumstance was required to be found beyond a reasonable doubt, a place for the aggravating circumstance to be entered, if found, and additional places for the jury to indicate whether or not they recommend the death penalty.

Code Ann. § 27-2534.1 (c) provides that "the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and *in writing* to the jury for its deliberation." We have in the

past approved the use of a verdict form which accurately and succinctly summarizes the trial court's oral instructions to the jury. See *Spraggins v. State*, 243 Ga. 73 (2) (252 SE2d 620) (1979); *Collins v. State*, 243 Ga. 291 (10) (253 SE2d 729) (1979). We find that the written instructions given in this case complied with the statutory requirement.

Enumeration of error 20 is without merit.

11. Appellant enumerates as error the trial judge's response to a question from the jury during the sentencing phase regarding how soon Tucker would be paroled if he were sentenced to life imprisonment. After beginning its deliberations, the jury returned to the courtroom, and its foreman asked, "What is the period which must expire before one is eligible for parole?" The trial court responded, "I'm sorry, ladies and gentlemen, the Court cannot answer that question, or help you at all on that. You'll have to retire." Defense counsel did not object to this response, and the jury retired to finish its deliberations.

Appellant argues that Code Ann. § 27-2206 establishes the legislative policy that a jury should not consider the possibility of parole or clemency in its deliberations. In *McGruder v. State*, 213 Ga. 259 (7) (98 SE2d 564) (1957), this court reversed a conviction because the trial court, in response to a question from the jury, stated that the defendant would serve whatever sentence was imposed by the jury "unless and until it is disturbed by the parole or pardon board." This court reasoned that the reference by the trial court to the board of pardon and parole might have influenced the jury away from a recommendation of mercy.

In Tucker's case, the trial court refused to answer the question or comment in any way about the possibility of parole, thus maintaining the neutrality required by statute. We find that *Thomas v. State*, 240 Ga. 393 (6) (242 SE2d [illegible] (1977), establishes that a trial court's flat refusal to answer a question about parole is not improperly suggestive and is not error.

Enumerations of error 4 and 5 are without merit.

12. Appellant argues that the sentence of death was imposed under the influence of prejudice or passion or

other arbitrary factor in that the court erred in failing to grant a change of venue because of prejudicial pretrial publicity. He asserts further that no defendant in Muscogee County in a case involving the sex-related murder of a woman and for which the district attorney was seeking the death penalty could receive a fair trial because at the time of the trial, a number of unsolved strangulation murders of women were terrorizing the community. A review of the voir dire examination reveals that those jurors who had been exposed to pretrial publicity regarding the crime with which appellant was charged or the strangulation murders stated that they could lay aside any impression or opinion which they might have formed and render an opinion based upon the evidence. Irvin v. Dowd, 366 U. S. 717 (1960); *Reaves v. State*, 242 Ga. 542 (250 SE2d 376) (1978). (Some veniremen were not questioned about pretrial publicity or about possible bias stemming from the crime situation in Columbus.) Only three veniremen were excused for prejudice from the panel (approximately five percent), and only one of these three was excused for prejudice regarding the unsolved strangulation murders. The low percentage of veniremen excused is clearly insufficient to establish that appellant faced a biased jury. Murphy v. Florida, 421 U. S. 794 (1974).[1]

Appellant also introduced the affidavits of five attorneys (two of whom were appellant's own attorneys) who practiced criminal law in the Columbus area which stated that due to the unsolved strangulation murders and the community's response, no defendant charged with a capital offense in which the state sought the death

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[1]Compare with *Collier v. State*, supra (20 percent dismissal rate corroborates absence of prejudicial bias); *Coleman v. State*, 237 Ga. 84 (226 SE2d 911) (1976) (49 percent dismissal rate corroborates absence of prejudicial bias); *Butler v. State*, 231 Ga. 276 (201 SE2d 448) (1973), cert. den., 420 U. S. 907 (1974) (36 percent dismissal rate corroborates absence of prejudicial community bias); and Irvin v. Dowd, 366 U. S. 717 (1960) (62 percent dismissal rate corroborates actual juror partiality).

penalty could receive a fair trial on the issue of sentence. Motions for change of venue address themselves to the sound discretion of the trial court, and that court's ruling will not be set aside unless the court has manifestly abused its discretion. *Coleman v. State*, supra; *Allen v. State*, 235 Ga. 709 (221 SE2d 405) (1975). In this case, we find no abuse of discretion. Appellant has failed to demonstrate that the circumstances surrounding the trial so prejudiced the jury that its sentence was motivated by passion and prejudice and was not based upon the evidence presented. See Murphy v. Florida, supra.

We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

Enumerations of error 14, 15 and 16 are without merit.

13. The evidence beyond a reasonable doubt supports the jury's finding of the statutory aggravating circumstance that the offense of murder was committed while the defendant was engaged in a capital felony, to wit: kidnapping with bodily injury. Code Ann. § 27-2534.1 (b) (2).

Appellant contends that because of the mitigating circumstances presented — that the recent death of appellant's father created severe emotional stress for him, that he was under the influence of alcohol and marijuana at the time he committed the crime, that he had no prior criminal record and that he had no prior history of an aggressive personality — the imposition of the death penalty in this case is cruel and unusual in violation of the Eighth Amendment and is contrary to law and the principles of justice and equity. We do not agree. Although there is evidence that appellant had been drinking on the day of the crime and had been smoking marijuana as well, no evidence was submitted to show that he was incapacitated or unable to form the requisite criminal intent. He waited for the store to clear of customers so his victim would be alone. He robbed the store, kidnapped his victim and held her for approximately one hour before stabbing her to death. Juries have given the death penalty in cases in which the defendant had no prior criminal record and where

evidence of use of alcohol or drugs was offered in mitigation. *Bowen v. State*, 241 Ga. 492 (246 SE2d 322) (1978), death sentence vacated for errors in jury charge and remanded for resentencing 244 Ga. 495, death sentence reimposed and affirmed; *House v. State*, 232 Ga. 140 (205 SE2d 217) (1974).

Enumeration of error 19 is without merit.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find the following similar cases listed in the appendix support affirmance of the death penalty. Appellant's sentence to death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur.

ARGUED JUNE 13, 1979 — DECIDED NOVEMBER 21, 1979.

Murder, etc. Muscogee Superior Court. Before Judge Davis.

Richard O. Smith, for appellant.

William J. Smith, District Attorney, J. Gray Conger, Assistant District Attorney, Arthur K. Bolton, Attorney General, W. Davis Hewitt, Staff Assistant Attorney General, for appellee.

APPENDIX.

Collier v. State, 244 Ga. 553 (1979); *Bowen v. State*, 244 Ga. 495 (1979); *Stanley v. State*, 240 Ga. 341 (241 SE2d 173) (1977); *House v. State*, 232 Ga. 140 (205 SE2d 217) (1974); *Gregg v. State*, 233 Ga. 117 (210 SE2d 659) (1974); *Hunter v. State*, 231 Ga. 494 (202 SE2d 441) (1973).

35041. BERCHENKO v. FULTON FEDERAL SAVINGS & LOAN ASSOCIATION OF ATLANTA, INC.

UNDERCOFLER, Presiding Justice.

Berchenko, claiming to be a referral agent entitled to a "finders fee" from Fulton Federal under an oral

APPENDIX 4

STAGE OF THE PROCEEDINGS AT WHICH THE FEDERAL QUESTIONS WERE RAISED

The question concerning the constitutionality of the jury charge and verdict form was first raised in paragraph 16 of the petition for writ of habeas corpus wherein petitioner alleged:

> 16. Petitioner Tucker's death sentence was imposed in violation of the Sixth, Eight and Fourteenth Amendments to the Constitution of the United States and in violation of Article I, Section I, Paragraph I, Sections I, XI and XIV of the Georgia Constitution because the trial judge charged the jury that they could recommend the death penalty and the form of the verdict provided that the jury could recommend the death penalty, when in fact under Ga. Code § 27-2534.1 the jury was actually imposing the death penalty. The jury was therefore not fully informed as to the meaning and effect of their verdict.

Petitioner fully briefed and argued this issue before the Butts County Superior Court. Petitioner also raised and fully briefed the issue in his application for a certificate of probable cause to appeal before the Supreme Court of Georgia. Enumeration of Error number 1 alleged:

> (1) The court erred in refusing to grant relief on the basis that the trial court charged the jury that they could recommend the death penalty and the form of the verdict provided that the jury could recommend the death penalty when, under Georgia Code § 27-2534.1, the jury was actually imposing the death sentence.

The question concerning the constitutionality of imposing the death penalty in the absence of an aggravating circumstance separate and apart from the alleged act of murder was first raised in paragraphs 12, 13, and 14 of the petition for writ of habeas corpus wherein petitioner alleged:

12. Petitioner Tucker's death sentence was imposed in violation of his right not to be deprived of life without due process of law and not to have a cruel and unusual punishment inflicted upon him, as secured by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraphs I and XIV of the Georgia Constitution because the evidence was insufficient, as a matter of law, to establish beyond a reasonable doubt the statutory aggravating circumstance of kidnapping with bodily injury.

13. Petitioner Tucker's death sentence was imposed in violation of his right not to be deprived of life without due process of law nor to be denied the equal protection of the laws nor to have a cruel and unusual punishment inflicted upon him, as secured by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraphs I and XIV of the Georgia Constitution because there is no way to distinguish this case from the many cases in which the death penalty was not imposed.

14. Petitioner Tucker's death sentence was imposed in violation of his right not to be deprived of life without due process of law nor to be denied the equal protection of the laws nor to have a cruel and unusual punishment inflicted upon him, as secured by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraphs I and XIV of the Georgia Constitution because the evidence failed to establish beyond a reasonable doubt an aggravating circumstance, separate and apart from the alleged act of murder.

Petitioner fully briefed and argued this issue before the Butts County Superior Court. Petitioner also raised and fully briefed the issue in his application for a certificate of probable cause to appeal before the Supreme Court of Georgia. Enumerations of Error 2 and 3 alleged:

(2) The court erred in refusing to grant relief on the basis that the evidence adduced at trial was insufficient to establish beyond a reasonable doubt the statutory aggravating circumstance of kidnapping with bodily injury.

(3) The court erred in refusing to grant relief on the basis that the evidence adduced at trial failed to establish beyond a reasonable doubt an aggravating circumstance separate and apart from the alleged act of murder.

The question concerning the constitutionality of the sentence review process was first raised in paragraph 31 of the petition for writ of habeas corpus and paragraph 34 of the amended petition wherein petition alleged:

31. Petitioner Tucker's conviction and the imposition and executing of the death sentence violate his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraphs I, XI and XIV and Section II, Paragraph III of the Georgia Constitution because the Georgia statutory provisions and practices governing appellate review of death sentences:

(A) deny petitioner the effective assistance of counsel;

(B) deny petitioner a fundamentally fair hearing on the issue of life or death;

(C) deny petitioner the effective assistance of counsel and the tools of an adequate defense and appeal because of his indigency.

34. Petitioner Tucker's U.S. Constitutional rights and his State Constitutional and Statutory Rights Were Violated because the Georgia Supreme Court relied on erroneous and incomplete information regarding Petitioner's sentence while they were reviewing his sentence and because petitioner had no opportunity to correct or to refute such information, upon which the Supreme Court relied.

Petitioner fully briefed and argued this issue before the Butts County Superior Court. Petitioner also raised and fully briefed the issue in his application for a certificate of probable cause to appeal before the Supreme Court of Georgia. Enumerations of Error 4, 6 and 8:

(4) The court erred in refusing to grant relief on the basis that the information upon which the Georgia Supreme

Court relied in conducting its review of petitioner's sentence was erroneous and incomplete.

(6) The court erred in refusing to grant relief on the basis that the sentence review conducted by the Georgia Supreme Court denied petitioner Tucker due process of law and the effective assistance of counsel.

(8) The court erred in denying petitioner's claim that the process for the appellate review of death sentences denied him effective assistance of counsel and a full and fair hearing.

APPENDIX 5

CHARGE OF THE COURT

Ladies and gentlemen, you have found the defendant guilty of the offense of murder. It is now your duty to determine within the limits prescribed by law the penalty that shall be imposed as punishment for that offense. In reaching this determination you are authorized to consider all of the evidence received by you in open court in both phases of the trial. You are authorized to consider all the facts and circumstances of the case. You will look to all the evidence in both phases of the trial, determine whether or not you find mitigating circumstances. If you do find them it will be your duty to consider them in arriving at your verdict. Now, mitigating circumstances are such as do not constitute a justification or excuse of the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability.

Now, under the laws of this State, every person guilty of the offense of murder shall be punishable by life in the penitentiary or death by electrocution.

Now, ladies and gentlemen, I charge you that before you would be authorized to consider a death sentence in this case, that it would be necessary that you find by a preponderance of the evidence that the aggravating circumstances which the State has alleged in this case, which I will read to

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you as follows, have been proven beyond a reasonable doubt, that is, that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: kidnapping with bodily injury. If you find beyond a reasonable doubt that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: kidnapping with bodily injury, you would be authorized but not required to impose the death penalty. If you find such circumstances it is entirely within your discretion to impose either the death penalty or life imprisonment.

Now, you will carry out with you in writing a paper which will again say to you what I have said on the necessity of proving these aggravating circumstances. If you find that they do not exist, if you have a reasonable doubt as to the existence then, of course, you would not be authorized to return a recommendation of the death penalty. If you find that such circumstances do exist, then it would be the duty of your foreman, if you find that beyond a reasonable doubt, to write in the aggravating circumstance which you find. If you find that that exists, then it is your duty to consider all of the matters that I have called to your attention, and in your discretion to say whether or not the jury will recommend the death penalty, or whether you will decline to recommend the death penalty.

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Now, in completing this is given you for your convenience. In completing this, the foreman should strike out that verdict which you do not wish to return, and should write in in pen your recommendation of either the death penalty or your refusal to recommend the death penalty.

Ladies and gentlemen, as I have told you, under those instructions it is entirely within your discretion, and it is your duty, to consider all these matters and to return a verdict recommending one or the other.

MR. CONGER: May we approach the bench, Your Honor?

(A discussion had, off the record, out of the hearing of the Court Reporter.)

THE COURT: Ladies and gentlemen, counsel has called my attention, on one occasion I inadvertantly said find existing the aggravating circumstance by a preponderance of the evidence, that is not the test. I later told you that it's by a reasonable doubt and that is the proper instruction, before you consider the death penalty you must find the existence of the aggravating circumstance beyond a reasonable doubt.

You may retire to the jury room and deliberate, and return a verdict as to punishment in this case.

(The jury leaves the courtroom to begin deliberations at 4:30 o'clock p.m.)

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IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	INDICTMENT NO. 38960
VS.	*	
WILLIAM BOYD TUCKER	*	MURDER

The following Aggravating Circumstance is submitted by The State of Georgia and must be proved beyond a reasonable doubt before you are authorized to find a Verdict recommending the Death Penalty.

1.

The offense of Murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Kidnapping With Bodily Injury.

VERDICT

We, the Jury find the following Aggravating Circumstance:

Kidnapping with Bodily Injury

We, the Jury, recommend the death penalty.

We, the Jury, do not recommend the death penalty.

This 9th day of March, 1978.

FOREMAN

306-07

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AFFIDAVIT OF FILING

Before an officer duly authorized to administer oaths, appeared Robert B. Remar, who, on oath, deposes and says the following:

I am counsel of record for William Boyd Tucker, Petitioner herein. I am a member of the Bar of this Court. On July 17, 1981, I deposited the within and foregoing Petition for Writ of Certiorari and Motion to Proceed In Forma Pauperis in a United States Post Office with first class postage prepaid, and properly addressed to the Clerk of this Court, within the time allowed for filing.

Robert B. Remar
ROBERT B. REMAR

Sworn to and subscribed before me
this 17th day of July, 1981.

Paul A. Walker
NOTARY PUBLIC

Notary Public, Georgia, State at Large
My Commission Expires Aug. 11, 1984

Opposition

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

NO. 81-5107

RECEIVED
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SUPREME COURT, U.S.

WILLIAM BOYD TUCKER,

Petitioner,

vs.

WALTER D. ZANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

W. DAVIS HEWITT
Assistant Attorney General

Please serve:

W. DAVIS HEWITT
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3355

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

NO. 81-5107

WILLIAM BOYD TUCKER,

Petitioner,

v.

WALTER D. ZANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

The Respondent, Walter D. Zant, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Order of the Superior Court of Butts County, Georgia denying Petitioner's petition for a writ of habeas corpus.

1. Whether the charge to the sentencing jury that they could "recommend" the death penalty and whether the form of the written verdict given to that jury, which also stated that the jury would "recommend" the death penalty, work a denial of Petitioner's constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, when under Georgia law the jury's verdict is more than a recommendation because the trial judge has no discretion to change the verdict?

2. Whether the evidence established an aggravating circumstance separate and apart from the act of murder?

3. Whether the Georgia Supreme Court adequately and properly reviewed Petitioner's death sentence in its comparison with other death penalty cases?

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II. STATEMENT OF THE CASE

William Boyd Tucker, Petitioner, was indicted in Muscogee County in August, 1977 for murder, armed robbery, kidnapping and aggravated sodomy of Kathleen L. Perry. (R. 2-11).[1] Following a jury trial, Petitioner was found guilty of murder, armed robbery and kidnapping. He was sentenced to death, life imprisonment and twenty years to run concurrently, for the respective crimes. (R. 27-29). A motion for new trial was denied January 16, 1979 (R. 1, 38). The Supreme Court of Georgia affirmed the conviction and the death sentence on November 21, 1979. Tucker v. State, 244 Ga. 721 (1979). This Court denied Petitioner's request for writ of certiorari to review the Georgia Supreme Court's affirmance of the conviction and death penalty. 445 U.S. 972 (1980). Petitioner then applied for a writ of habeas corpus with the Superior Court of Butts County, Georgia. This petition was denied by the Superior Court on February 18, 1981 and the application for certificate of probable cause to appeal to the Georgia Supreme Court was denied on April 22, 1981. Thereafter, Petitioner filed this application for a writ of certiorari.

On August 20, 1977, Kathleen Perry was manager of the Majik Market convenience store on the corner of 1711 Warm Springs Road and 17th Avenue in Columbus, where she worked daily from 4:00 p.m. until 12:00 midnight. (T. 350). Kathleen's husband,

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1/ Throughout this Brief, Respondent will refer to the pagination of the official record as (R. _), and reference to the trial transcript pagination will be designated as (T. _).

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Robert Perry, usually picked her up from work at closing time, however, on the night of August 20th, Robert was working late and told Kathleen he would be late. (T. 351, 352).

J. Brooks May, a nearby resident, stated that he frequently went to Majik Market and knew Kathleen. (T. 356, 357). May testified that on August 20th at 11:05 p.m., he went to the Market to place a long distance call, but waited because Kathleen was using the telephone. (T. 357, 358). May stated that when he came in the store, Petitioner was there playing pinball and walking around the store. (T. 359). May stated that while he was waiting, a customer, (Allen B. Wood) came in, made purchases and left. (T. 359). After May placed his telephone call from 11:40 p.m. to 11:45 p.m. and left, Petitioner and Kathleen were the only people remaining in the store. (T. 369).

Allen Wood testified that on August 20th, he went to Majik Market at 11:00 p.m. and again at 11:20 p.m. and both times saw May standing by the telephone and Petitioner playing pinball. (T. 371, 372, 374).

Laurie Brewer testified that she, her sister, and a friend went to the Market at approximately 12:15 a.m. on August 21st to buy some cokes. (T. 380, 381). All of the store's outside lights were turned off, however, the door was open and the inside store lights were on. (T. 381). Brewer, sister and friend observed a leather purse open behind the counter, but could not find a store operator after looking throughout the Market. (T. 381, 382). Subsequently, they phoned the police. (T. 382).

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Patrolman Carl Garnto of the Columbus Police Department reported to the Majik Market at approximately 12:45 a.m. and spoke with Brewer. (T. 464, 465). Garnto noticed the register was closed and there was loose change on the counter and a lady's purse opened on the floor. (T. 467). William E. Stoneking, area supervisor for Munford Corporation, was notified of the robbery and abduction and went to the Market. (T. 473, 474, 466). Stoneking found only small change in the register and found a deposit slip and $270.00 in currency in a cabinet under the checkout counter. (T. 474, 469). Garnto stated that the cabinet was closed when he arrived. (T. 468). Stoneking stated that it was usual procedure at closing, for the store clerk to leave $100.00 in the cash register and make a nightly deposit with the remaining amount. (T. 476). After auditing, Stoneking determined $112.00 plus change was missing from the register. (T. 476).

Reuben J. Culpepper and Bobby McLong testified that they and Bobby's sister, Victoria, were watching television and decided to go for a ride in Bobby's truck at approximately 1:00 a.m. on August 21st. (T. 392, 393, 436). The three were riding down Pierce Chapel Road when they noticed a red Volkswagen facing them, parked near the center of the road with its lights on. (T. 394, 436, 437). The car was parked in the direction of Warm Springs Road. (T. 409). McLong and Culpepper testified that as they slowly drove by, they saw a shoe and wet spots on the road next to the driver's side of the car. (T. 395, 437, 456). Culpepper and McLong stated that Petitioner was sitting in the car at the time. (T. 394, 437). One-fourth mile down the road, Culpepper, McLong and Victoria turned the truck around and headed back toward the car to see if Petitioner needed help. (T. 395, 438). As they drove back, Petitioner approached them driving in the opposite direction towards Hamilton Road, in a

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"state of acceleration." (T. 395, 397, 438). McLong got out of his truck where the VW car was parked and noticed the shoe was a woman's. (T. 396). The three young people felt something was wrong and began looking around the area. (T. 398). McLong discovered a Majik Market tunic in the bushes and later testified that, "I thought that I heard something, my sister and I both thought we had heard something, sounded like stepping on a frog, it was an exhaling sound." (T. 398, 399, 439, 444). McLong lit a match and saw the back legs of a body. (T. 398, 400, 405). After calling police, the three went back to the area and found a woman's body in a ditch ten feet off the shoulder of the road across from where the shoe and wet spot was located. (T. 399, 400, 402, 405, 423, 441). McLong checked for a pulse and noticed blood on the victim's back. (T. 400, 405, 440, 442). Nearby in the grass, McLong found a bra. (T. 400, 440). The wet spot on the road was located between the body and where the car was parked, (T. 410) and the bra, vest and shoe were found between the wet spot and the body. (T. 422).

Detective Johnny Harris of the Columbus Police Department arrived at Pierce Chapel Road at approximately 1:30 a.m. (T. 480), several policemen were already there talking with witnesses and investigating the site. A short while after police arrived, Culpepper spotted a red VW coming over the hill from Hamilton Road toward the scene. (T. 400, 401). When the car drew closer, Culpepper, McLong and Victoria identified Petitioner to police, as the man seen earlier, twice that night near where Kathleen's body was found. (T. 402, 423, 443). Sergeant Charles A. Bolden of the Columbus Police, testified that he arrested Petitioner when he drove up. (T. 426, 756-758). Petitioner asked Golden what was happening with all of the police cars and stated that he came to look for a lost wallet. (T. 713, 757).

Spots of blood were identified covering Petitioner's clothing. (T. 564, 637, 638). Majik Market matchbooks were found in the VW glove compartment and a brown paper bag with $112.00 in cash was found on the right front floorboard. (T. 631-633). Detective Harris sighted the victim's second shoe in the grass and one mile down the road found a pair of men's jockey shorts on top of the grass. (T. 485). Harris stated that the shorts were clean and free of morning dew. (T. 488, 489, 492).

Detective Robert G. Mathews of the Columbus Police Department testified that he arrived on Pierce Chapel Road at 2:15 a.m. and advised Petitioner of his rights and at the police station advised Petitioner of his rights again before Petitioner signed a waiver and made a statement to police. (T. 540, 541, 543, 545, 557, 635, 644, 646). Petitioner stated to Mathews that on the day of the murder, he went to the ball-park, drank several beers and at approximately 11:00 p.m., he went to the Majik Market where he played pinball, drank a beer in his car and played more pinball. (T. 647, 648). Petitioner stated that he sneaked up behind Kathleen, put his finger in her back to scare her. (T. 648). After Petitioner and Kathleen left the store with the money, Petitioner made Kathleen get in the backseat of his car and lie down. (T. 648). Petitioner stated that he drove down to Pierce Chapel Road, where he forced Kathleen to commit sodomy on him and then get in the car again. (T. 649, 762). Petitioner stated "she acted like she was willing to do anything to keep me from hurting her." (T. 649). After driving a couple of miles, Petitioner stopped to let Kathleen out. (T. 649). Petitioner further stated, "I remember having a long knife in my hand, with brown handles. I don't remember how I got it or what I did with it." (T. 649, 742). "I drove down the road and saw that I had blood on my hands. I then decided

to go back and see if I had hurt her. When I got back, I saw a lot of police cars and lights." (T. 649).

When asked how many times Petitioner stabbed Kathleen, he answered, "I don't know, there was a lot of blood." (T. 560, 649, 650). Columbus Police Department Director of Homicide, R. A. Jones, testified that after Petitioner concluded his statement at 7:14 a.m., Petitioner requested to call his attorney. (T. 652, 771). Petitioner stated that he had been drinking, but was not drunk. (T. 546, 554, 647). When Petitioner removed his clothing at the police station, Petitioner was not wearing shorts under his jeans. (T. 643).

Dr. Joe M. Webber, County Medical Examiner, performed an autopsy of Kathleen. (T. 512, 513). Dr. Webber stated that Kathleen was the victim of four knife wounds, one between the breasts into the heart, another in the back right shoulder blade, penetrating the lung, and two smaller cuts over the midline of the spinal column. (T. 514, 515, 523-525). The two larger wounds were five to six inches deep and the two nicks "were apparently stab attempts" but hit the bone and stopped. (T. 527, 530). Dr. Webber stated that the cause of death was a "wound to the heart, it punctured the left ventricle and the left ventricle immediately emptied of blood causing death abruptly." (T. 516). Dr. Webber also stated that Kathleen suffered from bruises, contusions and abrasions especially on the face, elbows, back of hands and front of knees, all of which could have been caused by dragging, sliding or falling on gravel or weeds. (T. 514).

May, Wood, Culpepper and McLong identified Petitioner in Recorder's Court after the arrest as the man they saw at the Majik Market or on Pierce Chapel Road near Kathleen on the night of her murder. (T. 360, 373, 403, 443).

John Chapman, Columbus City Detective, testified that he drove by Majik Market on his way home from work shortly after midnight on August 20th. (T. 383, 384). Chapman noticed a Volkswagen car parked at the Market with its lights on, but did not see anyone in the store. (T. 384). Later that night, Chapman saw the same type Volkswagen on Pierce Chapel Road where he was called to the murder scene. (T. 385).

On the witness stand, Petitioner stated that he consumed fourteen or fifteen beers and smoked more than three joints of marijuana between lunchtime and the murder. (T. 708). Petitioner admitted abducting Kathleen and taking the money, but stated he did not have weapon at the Majik Market. (T. 593, 704, 706). Petitioner stated he remembered taking Kathleen out of the store and letting her out of the car, however, he was vague on actions in between. (T. 706, 722, 737). Petitioner stated he did not remember seeing a knife or blood. (T. 707, 722, 746) but later Petitioner testified, "It dawned on me that I had robbed the store and that I had kidnapped a woman and I went back. The original intentions that I know of going back was to try to make amends. I did not remember killing her." (T. 735, 739).

Petitioner stated that he asked for an attorney prior to signing a waiver and a statement and that the police scared him into making a statement. (T. 579, 589, 719). Officers Mathew and Jones testified that Petitioner was not threatened in any way and that he freely signed a waiver prior to voluntarily giving police a statement. (T. 577, 610, 611, 623, 660). Fifteen to twenty minutes after his statement, Petitioner asked to call a specific attorney instead of receiving appointed counsel. (T. 562, 613, 765).

Mathew and Jones stated that during the statement, Petitioner was emotional, but was not drunk, although they could smell a faint odor of alcohol. (T. 555, 567, 611).

III. REASONS FOR NOT GRANTING THE WRIT

1.

The jury was properly charged on its duties in deciding the proper sentence for Petitioner's crime, and use of the word "recommendation" did not violate any of Petitioner's rights.

Petitioner's major complaint in the first argument deals with the use of the word "recommend" in the jury charge and on the verdict form given to the jury. It is alleged by Petitioner that use of this word insulates the jury from the consequences of its verdict because jury members might believe that the trial judge could ignore their verdict.

Throughout the sentencing phase of the trial, the court and defense counsel reiterated that the only issue for the jury's determination was the type of punishment it would impose and whether it should spare Petitioner's life. (T. 838, 910, 911, 912, 913). The trial court opened its instructions to the sentencing jury by stating: "Ladies and gentlemen of the jury, you have found the defendant guilty of the offense of murder. It is now your duty to determine within the limits prescribed by law the penalty that shall be imposed as punishment for that offense." (T. 913). The judge further instructed the sentencing jury that ". . . it is entirely within your discretion to impose either the death penalty or life imprisonment." (T. 914). It is clear from the entire jury charge and the comments by the trial court and defense counsel that the sentencing jury fully realized its' responsibilities in deciding Petitioner's sentence.

It is significant that the word "recommendation" is found throughout Georgia's statutory safeguards in death penalty cases. Ga. Code Ann. §26-3102, §27-2534.1(c). This method of imposing the death penalty has been upheld by this Court against constitutional attack. Gregg v. Georgia, 428 U.S. 153, 196-199 (1976). Because the jury was properly charged on its responsibilities under Georgia's statutory scheme, because that scheme has been declared constitutional, this Court should not grant the writ of certiorari to review this issue.

2.

The evidence was sufficient to establish beyond a reasonable doubt the aggravating circumstance of kidnapping with bodily injury.

In argument number 2 Petitioner alleges that the evidence failed to establish the injuries to the victim from the kidnapping occurred separately and apart from the act of murder. Although Petitioner raises a point directed to the trial court's charge on the subject of aggravating circumstances, (Petitioner's Brief at 8). The issue is not addressed in Petitioner's argument. Respondent therefore confines his argument to the sufficiency of the evidence to sustain the aggravating circumstance of kidnapping with bodily injury.

Under Georgia law the death penalty may only be imposed if the jury finds one of ten statutory aggravating circumstances beyond a reasonable doubt. Ga. Code Ann. §27-2534.1. Petitioner's death sentence was based upon the jury's finding that the murder occurred during the commission of another capital felony, kidnapping with bodily injury. Ga. Code Ann. §27-2534.1 (b)(2). Only kidnapping associated with bodily injury will

suffice as an aggravating circumstance, as simple kidnapping is not a capital felony. Patrick v. State, 247 Ga. 168 (1981).

The crux of Petitioner's argument is that the evidence must show the bodily injury which is necessary to make the kidnapping a capital felony occurred before and separate from the commission of the murder. This is clearly not the law in Georgia or under this Court's review of Georgia cases. In Pryor v. State, 238 Ga. 698 (1977), the Georgia Supreme Court dealt with a case similar to the present facts. The victim died from one of three gunshot wounds fired by the defendant after he had kidnapped the victim. While the evidence there showed the first shot was not the fatal one, the court felt that even a single fatal shot could be used to prove both the crime of murder and the aggravating circumstance of kidnapping with bodily harm. Pryor v. State, supra at 702-703. Clearly under Georgia law, the bodily injury associated with the kidnapping need not occur before the commission of the act of murder in order to suffice as an aggravating circumstance. Potts v. State, 241 Ga. 67, 86-87 (1978); Stephens v. Hopper, 241 Ga. 596, 600 (1978).

Petitioner argues that this Court's decision in Godfrey v. Georgia, 446 U.S. 420 requires that all aggravating circumstances involving injury to the victim must occur separate from the act causing the death itself. Neither Godfrey nor the Georgia Supreme Court's following of that case in Hance v. State, 245 Ga. 856 (1980) support Petitioner's contention. Both cases dealt with an aggravating circumstance completely separated from the one involved in the instant case. Furthermore, the Georgia Supreme Court has already construed the aggravating circumstance of kidnapping with bodily injury in light of the Godfrey decision in Wilson v. State, 246 Ga. 62 (1980). Because neither the decisions of this Court nor the

Georgia Supreme Court's constructions of the death penalty statute require the bodily injury to occur separately and apart from the commission of the act of murder, Petitioner's contention is without merit.

However even assuming, arguendo, Petitioner's argument, the evidence at trial was sufficient to enable a rational trier of fact to find the aggravating circumstance beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). There was evidence of several stab wounds, contusions, bruises and scratches separate from the fatal stab wound. (T. 512-531). On direct review of Petitioner's conviction and sentence the Georgia Supreme Court found the evidence sufficient to uphold the aggravating circumstance of kidnapping with bodily injury. Tucker v. State, 244 Ga. 721, 729 (1979).

This Court has upheld the constitutionality of Georgia's death penalty statutes. Gregg v. Georgia, 428 U.S. 153 (1976). The aggravating circumstance involved in the instant case is more specific and objectively measurable than the provision dealt with in Godfrey. See Gregg v. Georgia , supra at n.2. Because the law in this area is already settled and because the evidence here was sufficient to uphold the jury's sentence, the petition for a writ of certiorari to review this issue should be denied.

3.

Petitioner's death sentence was adequately and properly reviewed by the Georgia Supreme Court.

Georgia's death penalty law, including the scheme for appellate review, has been upheld by the United States Supreme Court. See e.g. Gregg v. Georgia, supra. As is evident from the report of the case, that review was conducted in Petitioner's

case in compliance with the statutory mandates. Tucker v. State, supra at 733. The constitutionality of this statute has already been litigated in this Court and the petition for writ of certiorari to review this issue should be denied.

IV. CONCLUSION

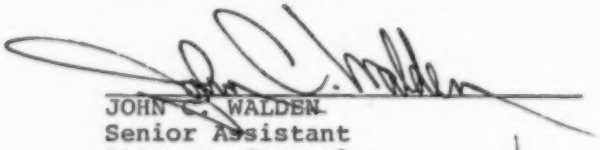
For all of the foregoing reasons, this Court should decline to grant the petition for writ of certiorari filed by William Boyd Tucker.

Respectfully submitted,

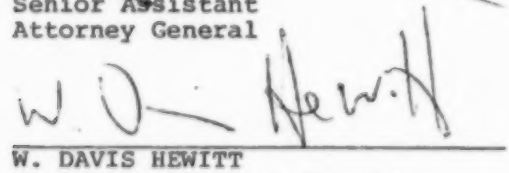
MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General



JOHN C. WALDEN
Senior Assistant
Attorney General



W. DAVIS HEWITT
Assistant Attorney General

Please serve:

W. DAVIS HEWITT
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-6344

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 16th day of September, 1981

Counsel for Respondent

Rober B. Remar
6658 Church Street
P. O. Box 1319
Douglasville, Georgia 30133

Lois R. Goodman
133 Luckie Street, N.W.
Eighth Floor
Atlanta, Georgia 30303

Eric G. Kocher
1276 Spring Street, S.E.
P. O. Drawer 1337
Gainesville, Georgia 30503

Supplemental Brief

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OCTOBER TERM, 1980

NO. 81-5107

WILLIAM BOYD TUCKER,

Petitioner,

v.

WALTER D. ZANT,

Respondent.

SUPPLEMENTAL MEMORANDUM OF RESPONDENT

Respectfully submitted,

W. DAVIS HEWITT
Assistant Attorney General
Counsel of Record for
Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3355

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NO. 81-5107

WILLIAM BOYD TUCKER,

Petitioner,

v.

WALTER D. ZANT,

Respondent.

SUPPLEMENTAL MEMORANDUM OF RESPONDENT

The Respondent now submits to the Court this Supplemental Memorandum to bring to the attention of the Court an error which was made in Respondent's Brief for Respondent in Opposition in the Statement of the Case portion of the brief. This error was also made in the brief for Respondent in opposition to the petition for certiorari on direct appeal, William Boyd Tucker v. State of Georgia, October Term 1979 No. 79-6187.

In these briefs the Respondents have indicated that the Petitioner was found guilty of murder, armed robbery and kidnapping. This is an error as the Petitioner was found guilty of murder, robbery by intimidation and kidnapping with bodily injury. The Respondent would point out that in both incidents this error was made inadvertently by counsel for Respondent and the Petitioner could have

been in no way harmed as the correct sentences were included in the Opinion of the Georgia Supreme Court Tucker v. State, 244 Ga. 721, 261 S.E.2d 635 (1979).

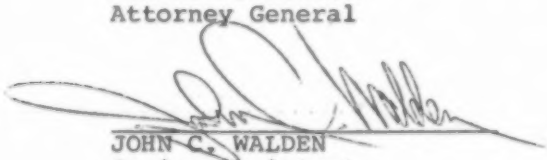
Therefore, the Respondent has written this supplemental memorandum merely to indicate that there is no dispute as to the sentences which the Petitioner is serving.

Respectfully submitted,

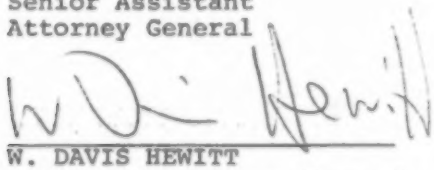
MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General



JOHN C. WALDEN
Senior Assistant
Attorney General



W. DAVIS HEWITT
Assistant Attorney General

Please serve:

W. DAVIS HEWITT
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3355